Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

Vol. 19 DECEMBER 4, 1985 No. 49

This issue contains:

AVAILABILITY OF BOND VOLUMES

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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

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U.S. Customs Service

Treasury Decisions

(T.D. 85-187)

Revocation of National Maritime Surveys, Inc. as a Customs Approved Public Gauger

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation.

SUMMARY: Pursuant to § 151.43(b), Customs Regulations (19 CFR 151.43(b)), National Maritime Surveys, Inc., 8935 Jefferson, River Ridge, Louisiana 70123, was approved to gauge imported petroleum and petroleum products. Notice of the approval was published as T.D. 81-188 in the Federal Register on July 21, 1981 (46 FR 37587). In order to be approved and keep approval in force, each public gauger must notify Customs, in writing, within 60 days of any change in name, address, ownership, or financial condition. After exhausting all feasible means to establish contact with National Maritime Surveys, Inc., Customs has been unable to locate them or determine if they are still in business.

Accordingly, the approval of National Maritime Surveys, Inc., to gauge imported petroleum and petroleum products in all Customs Districts is revoked.

DATE: December 4, 1985.

FOR FURTHER INFORMATION CONTACT: Roger J. Crain, Technical Services Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington D.C. 20229 (202-566-2446).

Dated: November 18, 1985.

ROGER J. CRAIN,
Chief, Technical Section,
Technical Services Division.

(T.D. 85-188)

Revocation of JenSpec USA, Inc., (Formerly Jenkins (West), Inc.) as a Customs Approved Public Gauger

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation.

SUMMARY: Pursuant to § 151.43(b), Customs Regulations (19 CFR 151.43(b)), JenSpec USA, Inc., (formerly Jenkins (West) Inc.) of 818B First Street, Benecia, California 94510, was approved to gauge imported petroleum and petroleum products. Notice of this approval (granted to Jenkins (West) Inc.) was published as T.D. 76-251. Customs has exhausted all feasible means to establish contact with JenSpec but has been unable to locate them. Customs has recently learned that JenSpec USA is no longer in business.

Accordingly, the approval of JenSpec USA, Inc., (formerly Jenkins (West) Inc.) to gauge imported petroleum and petroleum products in all Customs districts is revoked.

DATE: December 4, 1985.

FOR FURTHER INFORMATION CONTACT: Roger J. Crain, Technical Services Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington D.C. 20229 (202-566-2446).

Dated: November 18, 1985.

ROGER J. CRAIN,
Chief, Technical Section,
Technical Services Division.

U.S. Customs Service

Customs Service Decisions

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C.

The following are decisions of the United States Customs Service which are of sufficient interest or importance to warrant publication in the CUSTOMS BULLETIN.

B. JAMES FRITZ,
Director,
Regulations Control and Disclosure Law Division.

(C.S.D. 85–48)

This ruling holds that effecting a temporary change in the condition of a chemical substance for purposes of repacking does not negate the same condition drawback law (19 U.S.C. 1313(j)).

July 1, 1985
DRA–1–09–CO:R:CD:D
217982 B

Issues: 1. Is same condition drawback available for a crystalline chemical which is melted for purposes of repacking and shipping after which it resumes its crystalline status?

2. If the containers in which the chemical was imported are sold for scrap in the United States, is an adjustment made in the drawback?

Facts: A corporation imported crystalline dicumyl peroxide (Di-Cup R) in 186 metal drums. Di-Cup R is dutiable on an ad valorem basis and thus the value of the drums was added to the value of the Di-Cup R for assessment of duty, as provided for by General Headnote 6(b)(i), TSUS. The chemical was to be shipped to Montreal for use at a plant which is now closed. Another U.S. corporation will purchase the Di-Cup R for use at its facilities in Ontario, but only on condition that it receive the chemical in semi-bulk containers, known as SBC's. To transfer, or repack, the Di-Cup R into the SBC's it is necessary that it be melted and pumped into them, after which it returns to its crystalline form. At all times, this particular lot of 36,980 pounds of Di-Cup R will be segregated from other Di-

Cup R located at the plant in New Jersey where the repacking takes place. The drums in which the Di-Cup R were imported are to be cleaned and sold as scrap.

The corporation asks if the melting and repacking operations are permissible under the same condition drawback law, 19 U.S.C. 1313(j). It also asks if an adjustment is made in drawback because the drums are sold as scrap.

Law and Analysis: Normally, same condition drawback is unavailable for merchandise which has its condition changed in the United States by means other than permissible incidental operations, despite the fact that the merchandise is returned to its imported condition prior to exportation. An example of this situation is the accidental damaging of equipment which is restored to original condition. However, we have allowed same condition drawback in cases where changes in condition were brought about by other than incidental operations, when these operations were necessary to allow the imported merchandise to be subjected to a permissible use, provided the merchandise was returned to its imported condition prior to exportation. Thus, in C.S.D. 82–93, we allowed the assembly in the United States of a material handling robot for purposes of demonstration.

The robot has been imported unassembled because of shipping problems and we required that it be disassembled prior to exportation to return it to its imported condition. The instant case is analogous to the facts in C.S.D. 82–93. The Di-Cup R is being exported in the same condition as imported, save for different packaging. In order to accomplish the repacking, a specifically allowed operation under the law, the physical condition, but not the basic property, of the D-Cup R was temporarily altered. To deny same condition drawback based on this temporary change in condition for purposes of transportation or repacking would not be within the spirit of the same condition drawback law. Had the Di-Cup R remained liquid after the melting operation, the corporation most likely would have been able to obtain drawback under 19 U.S.C. 1313(a). See C.S.D. 84–19.

Under General Headnote 6(b)(i), TSUS, non-reusable containers are not treated as imported articles but their value is uncluded in the value of their contents. In this case, their value was added to that of the Di-Cup R. The proper procedure in this situation is to deduct the value of the containers (as scrap and before cleaning) from the value of the Di-Cup R. Thus, if Q is the value of the imported merchandise, X the value of the containers, and V the ad valorem duty rate on Di-Cup R, drawback will equal 99% of (Q–X) V.

Holdings: 1. Under the facts of this case, the crystalline dicumyl peroxide is eligible for same condition drawback assuming compliance with all pertinent regulations.

2. If non-reusable containers have value, this value is deducted from the total value of the imported merchandise before computing drawback.

(C.S.D. 85–49)

This ruling holds that privileged foreign and nonprivileged foreign merchandise, while stored in a foreign trade zone and exempt from the payment of duty, does not constitute duty-free merchandise within the meaning of the substitution manufacturing drawback law, 19 U.S.C. 1313(b). Articles manufactured therefrom, and then exported, may not be the subject of a claim for drawback under 19 U.S.C. 1313(b).

July 19, 1985.
DRA–1–CO:R:CD:D
217850 RB

Issue: While in a foreign-trade zone exempt from the payment of duty, does privileged foreign or nonprivileged foreign merchandise thereby constitute duty-free merchandise within the meaning of the substitution manufacturing drawback law, 19 U.S.C. 1313(b), so that an article manufactured therefrom, and them exported, may be the subject of a claim for drawback under section 1313(b)?

Facts: Prior to activation of its foreign-trade subzone, A, a motor vehicle manufacturer, imported transmissions, duty-paid, and used them in the manufacture of motor vehicles which were thereafter sold for domestic consumption. Following activation of its subzone, A admitted transmissions thereto in privileged foreign and nonprivileged foreign statuses, and then used them in the manufacture of motor vehicles which were exported. Accordingly, no duty was paid upon these latter transmissions. A claimed drawback under 19 U.S.C. 1313(b) on the exported vehicles manufactured with the use of the privileged foreign and nonprivileged foreign transmissions, and designated for drawback the duty-paid transmissions used prior to activation of the subzone.

Furthermore, A similarly claimed drawback under 19 U.S.C. 1313(b) on additional exported vehicles, a significant portion of which had been manufactured with the use of privileged foreign and nonprivileged foreign parts and, in so doing, A designated for drawback shipments of "identical" parts which had, from time to time, been previously imported, duty-paid, and admitted to the subzone in privileged domestic status, and there used in the manufacture of other vehicles which were entered for domestic consumption.

It is presumed herein that the remaining statutory and regulatory requirements applicable to section 1313(b), as to same kind and quality, time limits, etc., were properly satisfied.

Law and Analysis: The provisions of 19 U.S.C. 1313(b) provide in pertinent part for the allowance of drawback on exported articles

manufactured with the use of duty-paid, duty-free, or domestic merchandise.

Foreign merchandise in a zone pursuant to the Foreign-Trade Zones Act of 1934 (FTZA), as amended, 19 U.S.C. 81a-u, is, except as otherwise provided therein, exempt from the Customs laws of the United States affecting imported merchandise (19 U.S.C. 81c). This, of course, means, inter alia, that, while in a zone pursuant to the FTZA, such merchandise is exempt from the payment of duty.

> "[A foreign-trade zone] * * * differs from adjacent territory in being exempt from the Customs laws as affecting goods destined for reexport. It means simply that, as regards Customs duties, there is freedom *unless and until* imported goods enter the domestic market" (emphasis added) (FOREIGN TRADE ZONES, REPORT OF A SUBCOMMITTEE OF THE COMMITTEE ON WAYS AND MEANS on H.R. 3657 and H.R. 9322 (later enacted as the FTZA) (House Committee Print), 73d Cong., 2d Sess., at 1).

Foreign merchandise in a zone under such circumstances is thus conditionally free, and is not duty-free merchandise within the purport of section 1313(b). Compare in this connection ORR Ruling 74-0216, which held that merchandise imported temporarily free of duty under bond (TIB) in accordance with the provisions of Subpart 5C, Schedule 8, Tariff Schedules of the United States, was likewise conditionally free, and not duty-free merchandise within the meaning of section 1313(b).

Holding: While in a foreign-trade zone exempt from the payment of duty, privileged foreign or nonprivileged foreign merchandise does not thereby constitute duty-free merchandise within the meaning of the substitution manufacturing drawback law, 19 U.S.C. 1313(b), and, hence, an article manufactured thereform, and then exported, may not be the subject of a claim for drawback under section 1313(b).

(C.S.D. 85-50)

This ruling holds that "lawful duties" paid pursuant to 19 U.S.C. 1592(d) legally constitute "duties" and are therefore subject to drawback under 19 U.S.C. 1313.

July 25, 1985
DRA-1-09-CO:R:CD:D
218102 RB

Issue: Whether "lawful duties" paid pursuant to 19 U.S.C. 1592(d) legally constitute "duties" and are thus subject to drawback under 19 U.S.C. 1313?

Law and Analysis: Monies paid to the United States which legally constitute "duties" are properly the subject of drawback under 19 U.S.C. 1313 (see section 191.3, Customs Regulations, 19 CFR 191.3)

In this regard, as set forth in 19 U.S.C. 1592(d), "if the United States has been deprived of lawful duties as a result of a violation of subsection (a) of this section, the appropriate customs officer shall require that such lawful duties be restored, whether or not a monetary penalty is assessed." Section 1592(d) is implemented by section 162.79b. Customs Regulations (19 CFR 162.79b), which states that such lawful duties are to be restored within 30 days of a written notice demanding their deposit or payment, and that application may be made in this connection to the Commissioner of Customs for review.

By way of brief background, subsection (d) was added to section 1592 by the Customs Procedural Reform Act of 1978, Pub. L. No. 95–410, section 110(a), 92 Stat. 888, 896, in order to remedy the problems relating to the finality of liquidations. As a result, the United States, under section 1592(d), is able to require the restoration of duties even though a particular entry and liquidation have become final within the meaning of 19 U.S.C. 1514(a).

Accordingly, in *United States v. Ross,* 574 F. Supp. 1067, 1069 (U.S.C.I.T. 1983), the Court of International Trade, in holding that the United States did not have to follow the elaborate penalty procedures of section 1592 when pursuing "a duty claim" under subsection (d), stated that "[s]ubsections (b) and (c) of § 1592 are cast in such terms as 'monetary penalty' or 'penalty claim.' Subsection (d) alone deals with 'lawful duties' and makes no reference to the preceding matters."

Additionally, in C.S.D. 81–223, Customs concluded that a surety on a Customs entry bond was liable for the payment of "duty" determined to be due under section 1592(d), inasmuch as a surety was "jointly liable with a bond principal for payment of any duty due when demanded."

Hence, it is clearly recognized and understood both judicially and administratively that "lawful duties" paid under section 1592(d) simply represent "duties" from a legal standpoint, this view being fundamentally supported by the plain meaning as well as by the evident legislative intent of subsection (d).

Holding: "Lawful duties" paid pursuant to section 1592(d) legally constitute "duties" and are thus subject to drawback under 19 U.S.C. 1313.

(C.S.D. 85–51)

This ruling holds that imported merchandise may be used in substitution under the same condition drawback law (19 U.S.C. 1313(j)(3)).

July 26, 1985
DRA-1-09-CO:R:CD:C
218114 B

Issues: Is drawback allowed under the substitution same condition drawback law, 19 U.S.C. 1313(j)(3), upon exportation of imported fungible substituted merchandise, assuming compliance with all requirements of the law and guidelines as set out in C.S.D. 85–34?

Facts: A Customs broker has requested a ruling on the presented issue.

Law And Analysis: Section 202 of Public Law 98–573 sets out the provisions of the same condition substitution drawback law, 19 U.S.C. 1313(j)(3). Legislation has been introduced to designate correctly the provision as 19 U.S.C. 1313(j)(2).

The statute specifically provides:

> (j)(3) If there is, with respect to imported merchandise on which was paid any duty, tax, or fee imposed under Federal law because of its importation, any other merchandise (*whether imported or domestic*) that—
>
> (A) is fungible with the imported merchandise * * * (Emphasis added).

Holding: The law specifically allows substitution of other imported fungible merchandise for imported merchandise. This ruling is limited solely to the issue as stated

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(C.S.D. 85–52)

This ruling holds that ownership of a commodity is not necessarily possession of that commodity for purposes of the same condition substitution drawback law (19 U.S.C. 1313(j)(3)).

August 16, 1985
DRA-1-09-CO:R:CD:C
218100 B

Issues: Is crude degummed soybean oil (CDSBO) fungible for purposes of the same condition substitution drawback law 19 US.C. 1313(j)(3) under the facts set out below?

Under the following fact situations, is possession of the CDSBO sufficient pursuant to C.S.D. 85–34 to support drawback under the same law?

Facts: A corporation is apparently a commodities dealer and an importer and exporter of CDSBO, which is stated to be internationally traded and that no matter where produced, is "basically" (the corporation's term) the same. The corporation, through counsel, further states that there are no recognized differences in grade or type, and that a shipment of CDSBO from any country is considered within the industry to be a good delivery, unless, according to the corporation, "a particular country of origin is specified in the contract." Even then, there is "generally" no difference in grade, merely a "preference" of a product from a particular country, as is

the case with United States CDSBO because financing for the purchase of the product is dependent on the country of origin.

As to the question of possession, the following fact situations are proposed:

1. The corporation purchases CDSBO f.o.b. a vessel at a South American or European port. The CDSBO is then transported in that vessel to the United States, and the corporation imports it, pays duty on it, and stores it in a tank owned or leased by it. The corporation then sells the commodity to another entity in the U.S. for refining, and does not furnish a Certificate of Delivery (CF 7543) or otherwise transfer and drawback rights attendant to the imported CDSBO.

The corporation then purchases the same amount of U.S. CDSBO located somewhere in this country, and has it transported to the same port where importation of the aforementioned CDSBO occurred, placing the domestic CDSBO in tanks owned or leased by it. The domestic CDSBO is then sold c.i.f. or f.a.s. (free alongside vessel) at a foreign port. The corporation then timely (i.e., within 3 years of the date of importation of the foreign CDSBO) exports the domestic commodity.

2. Same as (1), except the corporation purchases the foreign origin CDSBO at the port of importation but does not act as importer of record.

3. Same as (1), except the corporation purchases the foreign CDSBO which has already been imported and placed in a Customs bonded tank. The corporation then makes entry for the CDSBO and pays all duties.

4. Same as (1), except the corporation sells the CDSBO while on the high seas before entry, and although acting as importer of record, does not place the CDSBO in its tanks, but instructs the shipping company to transport the CDSBO directly to the purchase in the U.S.

5. Same as (1), except the corporation purchases the CDSBO on c. & f. or c.i.f. U.S. port terms, acts as importer or record, pays the duties, but transfers the merchandise immediately to a purchaser at the port of entry. This is a combination of variants (2) and (4), but the corporation does not state at what time the sale was made. We believe based on our discussion below that the time of sale in this variant (5) is irrelevant.

6. Same as (1), except exportation occurs at a port other than that of importation.

7. Same as (1), except the exported shipment is sold f.o.b. vessel at the U.S. port.

8. Same as (1), except the corporation purchases the CDSBO to be exported in tanks or tank cars at the port of exportation, then sells it c. & f. foreign port, and has the commodity loaded directly onto a vessel bound for that foreign port.

9. Same as (1) with the (5) variant, then proceeds with the (8) variant.

10. Same as (9), except exportation occurs at a port other than the port of exportation.

The corporation, as represented by counsel, believes each of the above situations will support a valid claim for drawback under 19 U.S.C. 1313(j)(3).

Law and Analysis: 1. The law, enacted as 19 U.S.C. 1313(j)(3) and which is in the process of being corrected to 19 U.S.C. 1313(j)(2), allows for the substitution of domestic or other imported merchandise provided at the time of exportation (or destruction) the substituted merchandise is fungible (i.e., commercially identical, (see 19 CFR 91.2(k)(1)) with the imported and is in the same condition as was the imported at the time of its importation.

Counsel states there are no recognized differences in grade or type of soybean oil. This type oil and other types of vegetable oil are bought and sold under the rules of the National Cottonseed Products Association. Rule 102, Section 1, of the NCPA rules deals with the standard of quality of crude soybean oil. The types of crude soybean oil are set out in section 1(A)(1–7) of that rule. Crude soybean oil must meet standards of color, free fatty acid limits, moisture and volatile contents and other standards. Crude degummed soybean oil can contain no more than 0.03 percent phosphorous as determined by A.O.C.S. tentative method GA 1–53. The best method to prove fungibility of agricultural commodities is to obtain chemical analyses of the designated and substituted materials.

We will assume that all CDSBO in question is just that, per the standards of Rule 102, for purposes of this ruling.

The commercial world consists of buyers, sellers, comminglers, government agencies, and others. If these groups treat articles or merchandise as fungible or commercially identical, the articles or merchandise are fungible. Whether these groups treat the articles or merchandise as fungible is a question of fact, not law. Generally, fungible merchandise is identified by records, rather than physical properties. When two or more units of apparently identical properties are treated differently by the commercial world for any reason, then they are not fungible.

Words and phrases such as "generally no difference", "preference for product," (over another), "basically the same," etc. are anathema to the concept of fungibility. Counsel in this case states there is "generally no difference of grade, merely a preference for product from a particular country * * *" This is an admission that the CDSBO in the instant case is probably not fungible.

The commercial world treats articles as different and not fungible for several reasons. The articles may be physically different, an obvious case, or they may have different origins, history, or association values. An example of the latter cases would be an original

Roman coin and its reproduced twin. These would not be fungible because of the respective histories and associations attached to the genuine article and the reproduction. So, too, if the commercial world for snobbish, sentimental, or financial reasons values an article made in one country more than the identical article made in another, the two articles are not fungible. Parenthetically, we add here that more than once in the many telephonic conversations between staff lawyers and soybean trading sector representatives, unsolicited comments were made by the latter that United States CDSBO is more highly sought than, for example, Brazilian.

2. Despite the apparent nonfungibility of the various CDSBO's in this case, we will rule on the possession aspects of the various situations set out by counsel because we were asked to do so.

"Possession" for purposes of the same condition drawback law means just that. It means complete control over the articles or merchandise on premises or locations where the possessor can put the articles or merchandise to any use chosen. It does not mean that by trading commercial paper, e.g., purchase orders or bills of lading, between brokers or others in a commodity while that commodity wends its way across America by train or truck, possession is somehow created. Transactions made in order to create a climate for drawback, or stated another way, ersatz transactions made to resemble bona fide transactions, will not support drawback. See C.S.D.'s 81-76 and 81-218. To hold that for purposes of same condition drawback arbitragers and futures dealers in commodities have "possession" of these commodities because of the purchase of commercial paper and temporary storage in leased bins or tanks, would not further the intent of the Congress or the fundamental purpose of the drawback law.

This is not to say any or all the proposed situations set forth by counsel are not bona fides. It is to say that transactions and sales of commodities will be and should be carefully scrutinized by Customs, because many bona fide sales transactions in commodities do not create possession. The question is: Does the legal person possess paper or the commodity itself?

The port of exportation need not be the port of importation for any type of drawback; therefore, this aspect of the situations will not be further discussed. The corporation in none of the cases has possession under C.S.D. 85-34 of both the imported and domestic oil. That ruling requires that the designated and substituted merchandise must have been in the possession of a single entity during a period beginning on the date of importation and ending on the date of exportation, such period not to exceed three years. Certainly, the purchase of CDSBO located in tanks or tank cars at a port of exportation just prior to exportation of the oil is not possession of that oil. Just as certainly, sale of oil purchased on the high seas and shipped immediately upon arrival to another purchaser does not constitute possession, despite the fact that the high seas pur-

chaser makes entry for and pays duty on the merchandise. In short, temporary ownership, even such ownership with concurrent storage in tanks leased or owned by the owner, does not create possession if the "owner" is dealing in commercial paper, rather than the commodity itself. Middleman dealers in commodities are not possessors despite being owners.

Holdings: 1. Based on the facts, the crude degummed soybean oil is not fungible in this case.

2. The corporation in none of the situations set out by counsel has possession of both the imported and substituted soybean oil to the extent necessary to support a claim for drawback under 19 U.S.C. 1313(j)(3).

(C.S.D. 85–53)

This ruling holds that failure to meet specifications for merchandise sought to be exported with drawback under 19 U.S.C. 1313(c) as rejected merchandise must be brought to the attention of Customs immediately upon discovery in order to support an extension of the 90-day period authorized under 19 CFR 191.142(a)(4) for return of rejected merchandise to Customs custody. Mere allegations of failure to meet specifications will not support a claim for drawback under 19 U.S.C. 1313(c).

August 30, 1985
DRA–1–09–CO:R:CD:D
218215 B

DIRECTOR, CLASSIFICATION AND VALUE DIVISION,
Chicago, Illinois 60603

Re: Chicago Protest and Request for Further Review 3501–4–000006 of March 29, 1984—19 U.S.C. 1313(c)—Specifications—Latent Defects—Polysulphone Support and Spacer Plates

DEAR SIR: This is in reference to the referenced protest, request for further review, and other referenced subjects.

Issue: 1. When must alleged failures to meet specifications for merchandise sought to be exported with drawback under 19 U.S.C. 1313(c) as rejected merchandise be brought to Customs attention in order to obtain an extension of the 90-day return of merchandise provision in the statute and former section 22.33(a) and present section 191.142(a)(4) of the Customs Regulations?

2. Are allegations of failure to meet Governmental standards sufficient to prove merchandise ordered does or did not meet those standards?

Facts: Polysulphone spacer plates and supports used in the processing or production of whey by reverse osmosis were imported by protestant between some time in April 1981, and November 1982, under cover of approximately 100 entries. These were supplied to and installed in various dairies by protestant. On August 20, 1983, protestant's broker notified the District Director at Minneapolis of

its intent to return the plates because they were defective, and that due to circumstances beyond its control, protestant was prevented from returning the merchandise to Customs custody within 90 days of its release, as required by section 1313(c) and former section 22.33(a) of the regulations. The District Director or his designee agreed to an extension of time for return of the goods under the same regulations, evidently believing the defects discovered by the protestant were latent.

Customs accepted eighteen drawback entries on October 13, 1983, and drawback was denied on December 21, 1983. Protestant claims in the timely protest filed March 20, 1984, that the spacer supports and plates did not meet minimum life requirements as agreed to by the manufacturer and that they did not meet United States Department of Agriculture (U.S.D.A.) requirements, as conveyed to the manufacturer and agreed to by the manufacturer/supplier. The manufacturer has agreed to replace the supports and spacers "at cost," approximately 70 percent of the normal price to its customers.

Drawback was denied because there was no showing of any failure to meet warranties or guarantees to support a rejected merchandise claim, and further there was no evidence showing failure to conform to U.S.D.A. standards or that protestant had communicated these standards to the seller as part of the agreement to purchase.

Law and Analysis: Former section 22.32(b) of the Customs Regulations (present section 191.142(b)(2)) requires the claimant for drawback for rejected merchandise to submit, if no written order was placed, a certificate of the actual owner setting forth the specifications of the order and the method by which the specifications were communicated to the seller.

The polysulphone spacers replaced noryl support and spacer plates which had previously resulted in product leakage in 1977. In the dairy industry, leakage and the sanitary problem caused by the trapping of whey in the space plates did not occur and were not discovered overnight. Regarding noryl plates, used prior to the polysulphone plates, the U.S.D.A. had written protestant in December 1977, referring to minor problems, as well as the major problems of trapped whey and leakage. U.S.D.A.'s Poultry and Dairy Quality Division informed protestant that further inspection would be delayed until the initial of protestant's customers' plants was equipped with the new (polysulphone) plates. On February 8, 1978, the manufacturer/supplier, in a letter to protestant, informed it that "* * * it is important to check the assembling) pressure (30,000 kp) before the starting up." Regarding the leakage, the manufacturer would examine the possibility of insertion of pipe fittings all the way through the module flange as proposed by protestant, but that the problem was * * * "(T)hat our present stock of flanges with male parts pressed-in will be enough for *2 years' con-*

sumption, and an alteration of these will therefore be very expensive." (Emphasis added.) Drawings were supplied by the manufacturer with the letter which it claimed show that when the flange is pressed down at 5,000 kp pressure, the leakage/sanitary danger would not arise.

U.S.D.A. then informed the protestant that the "press-fit" arrangement shown by the drawings "appears to be satisfactory until the present inventory is used up." Letter of April 2, 1978, from U.S.D.A. Dairy Inspection Branch to protestant. On July 25, 1980, the Poultry and Dairy Quality Division, U.S.D.A., regional supervisor wrote one of protestant's dairies that "in view of light materials observed on the plates and other unsatisfactory conditions observed * * * we are not able to approve the whey operation at this time." The file in this case also contains notes/memoranda made by the U.S.D.A. field representative saying "(the noryl) plates are breaking like mad by the hundreds * * *" (but) "DDS (the manufacturer) has new plates made of polysulphone now—We're norel (sic), Will replace all US norel (sic) plates. Still have double outside seal ring but research underway to eliminate it." The representative was referring to the new polysulphone plates as still having the double outside ring which resulted in leakage but that research was underway to eliminate leakage. Notes of a June 6, 1981, phone conversation indicate protestant was "busy replacing noryl plates with new double ring polysulphone type. They're cleaning great, *except between the rings. New single ring PS plate is coming along next.* Old ring 2 plates will go to animal feed * * * (Unknown) isn't having trouble with breaking plates." (Emphasis added.)

The foregoing notes taken by a U.S.D.A. official from statements made telephonically by protestant's representative indicate the plates in question here were accepted or at least acceptable even though they did not clean well, and did not eliminate leakage entirely, and that protestant apparently was willing to use them until "research" resulted in leakproof equipment, i.e., the single-ring plates which are apparently being sold at cost by the manufacturer to replace the rejected plates. Another representative of protestant informed U.S.D.A. in March 1982, that DDS still had the double ring plates but that protestant would replace them "free" later.

Former section 22.33(a), Customs Regulations requires that rejected merchandise be returned to Customs custody within 90 days of its release, and no extension of that period will be given unless the district director is satisfied the importer has been or will be prevented by circumstances beyond his control from returning the merchandise within the prescribed periods. See section 191.142(a)(1) of the present Customs Regulations.

Customs has allowed importers to return rejected merchandise after the 90-day period when it is convinced the failure to meet a specification was not discovered or was incapable of being discovered because of latent defects which surfaced after the running of

the 90-day period. Implicit in allowing extensions for such hidden defects, such as in C.S.D. 81–176, is that latent defects are brought to Customs attention at the time they become patent defects. It is true that in this case Customs allowed an extension of time for filing the entries and returning the plates to our custody. But this allowance was based on the assumption that the sanitary and leakage problems were of recent vintage. The file indicates that as early as six weeks after the initial entry of the double ring polysulphone plates, on June 12, 1981, they did not clean properly and that on April 4, 1981, protestant was aware that the double ring polysulphone plates would not eliminate the leakage inherent in the noryl plates but that research was under way. In short, insofar as specifications are concerned, protestant received the plates which it ordered, and was awaiting until improved replacement plates (single ring) were available from the manufacturer. When they finally were available, over 26 months after initial importation, protestant filed rejected merchandise drawback entries in August 1983, claiming latent defects precluded earlier return. As to life expectancy, there is no evidence in the file to indicate premature breakage of the double ring plates. Protestant apparently ordered a stock item and "hoped for the best" pending technological improvement. In any case, we have previously held that failure to meet warranty guarantees as to length of services does not in and of itself constitute a failure to conform to specifications. When the credit allowed in such cases is for all or substantially all of the purchase price, the merchandise may be considered as not conforming. T.D. 66–169–1, cited in C.S.D. 83–104. Here, the replacement plates are being supplied at cost, approximately 70 percent of the usual price. This does not meet our standards set in T.D. 66–69–1 as to the *possibility* of warranty guarantees supporting a claim of failure to meet specifications.

Counsel for protestant cites many court cases referring to type of proof, and acceptance of such proof, necessary to show a communication of certain necessary specifications between the buyer/importer and the foreign seller/manufacturer, e.g., *Pistachio Corporation v. United States,* 23 Cust. Ct. 103, C.D. 1198 (1949) app. dismissed 37 CCPA 127 (1950); *Lansing Company v. United States,* 77 Cust. Ct. 92, C.D. 4675 (1976). In these cases, however, the claimant submitted proof of some defect in merchandise sufficient, in the courts' opinions, for the claimant to carry the burden of proof. In the instant case, counsel alleges that the plates broke within 8 or 9 months, and sometimes as soon as two or three weeks. There is no reference in the file to breakage of the polysulphone plates, other than the allegation by counsel. All references to breakage are to the earlier noryl plates. Further, counsel alleges because dairy products manufactured, processed, or packaged in a nonapproved plant could not be inspected by the U.S.D.A., citing 7 CFR 58.122(a) (1983), that these plates did not meet U.S.D.A standards, a specifi-

cation required by the protestant. The file does include some references by the U.S.D.A. to unacceptable sanitary conditions, leakage, and the like, attendant to the noryl plates, but there is no indication from the Department of Argiculture that these conditions would place any of protestant's customers' plants under the sanctions of the noted U.S.D.A regulation if the polysulphone plates were used. On the contrary, the U.S.D.A. officials involved apparently only gave protestant notice of the shortcomings on the noryl plates, and suggestions how to correct them, noting that the officials would reinspect the operation at a later date. In fact, the drawings referred to above regarding assembly were pronounced "satisfactory" by U.S.D.A. until the present inventory is used up. There are no indications that U.S.D.A. stated that no product of these dairies would be inspected or that any orders were issued to stop production of whey or other dairy products for human consumption while polysulphone plates were used. In short, other than counsel's allegation of failure to meet U.S.D.A. specifications, we have no other indication of this failure. It certainly is not mentioned in protestant's broker's letter of August 30, 1983, to the District Director, where he was told that the reason for delay in returning defective units was due to time necessary for replacing the defective plates and rebuilding their modules.

The courts have allowed drawback in these cases based on unwritten specifications, (*Lansing, supra*), and oral specification. *Mattia Localelli v. U.S.*, T.D. 46390, 63 Treas. Dec. 829 (1930). However, also in these cases and crucial to the courts' findings, it was shown that such specifications had been breached. Other than counsel's allegation, in the case before us we have no showing of such a breach, and mere allegations by counsel are not evidence. *Bar Bea Truck Leasing Co., Inc. v. U.S.*, 5 CIT 124, Slip Op. 83–22 (1983).

The provision for refunds on rejected merchandise was initiated to help American importers who receive goods that were so far from specifications as to be useless. See C.S.D. 84–110, citing the legislative history found in H. Rept. 7, 71st Cong., 161 (1929); H. Doc. 15, 71st Cong., 333 (1929); and S. Rept. 27, 71st Cong., 62 (1929), and C.S.D. 83–104 *supra*, citing legislative history of Public Law 71–369, 71st Cong. (H.R. 2667), Vol. 9, Part 2, part 9749, in particular.

Granting *arguendo* the plates did not meet U.S.D.A. or other specifications, protestant continued to import them and use them as they were ordered, until the new, improved models were available. At that time, alleged defects were called to Customs attention with an attendant claim for drawback. The Congress did not contemplate a refund of drawback in these circumstances.

Holding: 1. Drawback claimants under 19 U.S.C. 1313(c) must bring latent defects to Customs attention immediately upon discovery to be eligible for an extension of the 90-day period for return of rejected merchandise to Customs custody.

2. Mere allegations of failure to meet Governmental Standards are not sufficient to meet the burden of drawback claimants under 19 U.S.C. 1313(c).

You are directed to deny the protest in full.

(C.S.D. 85-54)

This ruling addresses and elucidates certain amendments to the Customs Regulations, as set forth in Treasury Decision 85-91, on Customs entrance and clearance requirements for vessels engaged in lightering operations.

September 18, 1985
VES-5-18-CO:R:CD:C
107876 PH

MR. ROGER BEAUDEAN,
Sales Manager, Leevac Marine Transportation, Post Office Box 2528, Morgan City, Louisiana 70381

DEAR MR. BEAUDEAN: With your letter of August 23, 1985, you sent a copy of your letter dated August 16, 1985, to the District Director of Customs in New Orleans concerning Customs entrance and clearance requirements for vessels engaged in lightering operations. You are concerned with the amendments to the Customs Regulations described in Treasury Decision 85-91, published in the Federal Register on May 24, 1985 (50 FR 21427).

In your August 23 letter you state that the amendments will, in essence, put your company out of business because the cost of your lightering service will "skyrocket" to the degree that oil companies will "light load" their tankers and not need lightering services. You state that other companies you are aware of which will be affected by this change are Sonat Marine, Moran Towing, and Bouchard.

In your August 16 letter to the District Director you state that your company has been engaged in the lightering and bunkering of foreign tankers via ocean-going tank barges since the early 1960's. You state that you presently lighter tankers and clear the cargo through Customs upon arrival at the destination port. You state that all of your vessels are American-flag and also engage in the coastwise trade.

You describe three examples in which you believe the amendments would adversely affect your company. The examples concern lightering and bunkering. We are quoting them in full below.

> 1. The DOMAR 18 (tank barge) discharges No. 6 fuel oil in Tampa, Florida, and departs light barge back to the upper United States Gulf Coast. The cargo was normal coastwise trade. The voyage takes three (3) days. After one (1) day at sea Exxon calls and wants to lighter one of their foreign tankers at Southwest Pass. We are now in the middle of the Gulf of Mexico. Does this change mean we have to pass up the tanker

at Southwest Pass, come into port, clear Customs, and then go back out and lighter the tanker?

2. The DOMAR 6501 (tank barge) picks up bunkers for a Texaco tanker located at South Sabine Point. This location is 70 miles offshore. Our next job after discharge is the lightering of an Exxon tanker off of Galveston, Texas. Do we have to come back in port (70 miles), clear Customs, and then go out to the Exxon tanker?

3. The DOMAR 6501 (tank barge) picks up bunkers for a Texaco tanker off Corpus Christi, Texas. We make the delivery and our next cargo is to be loaded at Chevron, Pascagoula, Mississippi. Do we have to clear Customs to take the cargo out, then come back into port, clear Customs, and then go to Pascagoula, Mississippi? We can not go from Corpus Christi to Pascagoula in the required 48 hours.

In addition to the examples you describe, the District Director of Customs in New Orleans, who has forwarded to us a copy of your August 16 letter to him about this matter, describes a lightering example and asks if the vessel entrance and clearance requirements apply to it, under Treasury Decision 85–91. In that example:

The M/T EXXON TRADER arrives at the Mississippi River Southwest Pass (outside Customs territory) with foreign crude for discharge in Baton Rouge, Louisiana. Due to draft restrictions at the pass, the tanker must lighter approximately one-eighth of its cargo into the DOMAR 118 (tank barge). After lightering the tanker proceeds through the pass and (now in Customs territory) relighters its cargo from the DOMAR 118. The tanker then proceeds to Baton Rouge with all of its cargo on board.

The point of re-lightering occurs approximately 80 miles south of the New Orleans port limits. The DOMAR 118 is a United States-flag vessel which engages in coastwise and foreign trade. Does the DOMAR 118 require foreign clearance from Customs prior to lightering the tanker? Is the DOMAR 118 required to make entrance when entering Customs territory? Since the M/T EXXON TRADER is not a sister vessel, may the re-lightering from DOMAR 118 be allowed? If re-loading is not allowed, is a separate entry (CF 3461 or CF 7501) required?

You request a clarification of the amendments affected by Treasury Decision 85–91. If your interpretation is correct, you ask for a change or exemption from the regulation.

Treasury Decision 85–91 amended sections 4.3, 4.9, 4.20, and 4.60, Customs Regulations (19 CFR 4.3, 4.9, 4.20, and 4.60), to require a vessel to obtain clearance if it is bound for another vessel on the high seas to either: (1) transship export merchandise which it has transported from the United States to that vessel; or (2) receive import merchandise from that vessel and transport the merchandise to the United States. A vessel is required to make vessel entry if it is returning from another vessel on the high seas after either: (1) transporting export merchandise out of the United States and

transshipping the merchandise to that vessel; or (2) transporting import merchandise to the United States after receiving the merchandise from that vessel. Copies of the Treasury Decision and the Notice of Proposed Rulemaking (Federal Register of October 3, 1984 (49 FR 39072)) and the Advance Notice of Proposed Rulemaking (Federal Register of October 14, 1983 (48 FR 46808)) for the Treasury Decision are enclosed.

Treasury Decision 85–91, as stated therein, was issued to clarify the applicability of the entrance and clearance requirements of the navigation laws to vessels engaged in lightering of import and export cargo between the United States and vessels located on the high seas. There was no intention to expand the applicability of those requirements. Such action would require legislation.

With few exceptions, entrance and clearance requirements are only applicable to vessels when they are in the United States. The very rare exceptions must be by statute. An example of such a statutory exception, although not relevant to your inquiry, is the applicability of the entrance and clearance laws to mobile rigs during the period when they are secured to or submerged onto the seabed of the outer continental shelf beyond the territorial waters of the United States for drilling operations (see Treasury Decision 54281(1)). This is in accordance with section 4(a) of the Outer Continental Shelf Lands Act of 1953, as amended (43 U.S.C. 1333(a)). Normally, entrance requirements of the navigation laws are only applicable to vessels when arriving in the United States from a foreign port or place and clearance requirements of the navigation laws are only applicable to vessels when bound out of the United States for a foreign port or place. Treasury Decision 85–91 clarifies the status of a vessel on the high seas as "a foreign port or place" with regard to the applicability of the entrance and clearance requirements to lighters and other vessels arriving in the United States or bound out of the United States when engaged in the transportation of import and export cargo between the vessel on the high seas and the United States.

In the first example you give, a United States-flag coastwise-qualified tank barge is in the "middle of the Gulf of Mexico" proceeding between United States ports after completing a coastwise movement. The vessel operator receives a request to divert the vessel to a foreign tanker in the Gulf of Mexico to lighter some of the tanker's cargo.

The coastwise-qualified tank barge is on a vessel movement not subject to entrance and clearance requirements (see section 4.81(a), Customs Regulations; 19 CFR 4.81(a)). While on the high seas it receives orders to proceed to a vessel on the high seas and receive import merchandise for transportation to the United States. Since the tank barge was not in the United States but on the high seas in a movement not subject to Customs entrance and clearance requirements when it received orders to proceed to the vessel on the

high seas, it is not subject to the clearance requirement of section 4.60(e), Customs Regulations (19 CFR 4.60(e)), as amended by Treasury Decision 85–91.

Of course, on return to the United States with the import merchandise from the vessel on the high seas, the tank barge would be required to enter under sections 4.3(c) and 4.9(a), Customs Regulations (19 CFR 4.3(c) and 4.9(a)), as amended by Treasury Decision 85–91.

In the second example, a United States-flag coastwise-qualified tank barge transports bunkers to a tanker located 70 miles off shore and, after discharging the bunkers, proceeds to lighter a tanker on the high seas. Again, assuming that the tank barge was on the high seas when it received orders to proceed to the tanker on the high seas, the tank barge would not be required by the amended section 4.60, Customs Regulations, to obtain clearance from Customs before proceeding to the tanker on the high seas. Of course, it would be required to enter, by the amended sections 4.3 and 4.9, Customs Regulations, on returning to the United States with the lightered import cargo. The tank barge would not have been required to obtain clearance from Customs before proceeding to transport the bunkers to the first tanker, nor would it be required to enter when returning from the bunkering voyage.

In the third example, a United States-flag coastwise-qualified tank barge proceeds from one United States port to a vessel in the Gulf of Mexico to which it delivers bunkers and then proceeds to another United States port where it takes on cargo. In this case, the tank barge is not subject to clearance at the first port, nor is it required to enter at the first port or any other port after delivering the bunkers. The Treasury Decision 85–91 amendments do not make the entrance and clearance requirements applicable to a vessel transporting bunkers, or stores, supplies, spare parts, or crew members, to a vessel on the high seas, as specifically stated in the Notice of Proposed Rulemaking for the amendments and the Analysis of Comments in the Final Rule for the amendments.

In the fourth example, a United States-flag coastwise-qualified tank barge receives import cargo from a tanker at a point outside Customs territory (and thus, outside territorial waters) so that the tanker can proceed through the Southwest Pass at the Mississippi River. After the tanker has proceeded through the Pass, the tank barge, now in Customs territory, transships the cargo back to the tanker. The tanker proceeds to a United States port to unlade the cargo.

The Treasury Decision 85–91 amendments were intended to apply the vessel entrance and clearance requirements to vessels engaged in the transshipping or lightering of export or import cargo to or from another vessel on the high seas. The concern was that "import and export cargo of the U.S. [could] be transported in vessels not subject to statutory entry and clearance requirements

upon arrival at or departure from the U.S." (See, Treasury Decision 85–91, under "Background.")

In the fourth example, the tank barge only temporarily lighters the tanker and the tanker proceeds to a United States port where it unlades its cargo, including the cargo which was temporary lightered. All of the import cargo will be unladed from a vessel "subject to statutory entry and clearance requirements upon arrival at or departure from the U.S." Therefore, Treasury Decision 85–91 does not apply to the tank barge in this situation and the barge is not required to obtain clearance from Customs before temporarily lightering the tanker or to make vessel entry when arriving empty at a United States port after completing this operation.

We appreciate your communicating to us your concerns about the possible effects of the Treasury Decision 85–91 amendments. We hope that you will continue to keep us informed of any effects of the amendments on operations such as those of your company.

U.S. Customs Service

General Notice

19 CFR Part 175

Receipt of Domestic Interested Party Petition Concerning Tariff Classification of Curtains Made From Macrame and Voile

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of receipt of domestic interested party petition; solicitation of comments.

SUMMARY: Customs has received a petition submitted on behalf of a domestic interested party requesting the reclassification of curtain panels and valances imported from Holland. These imported curtains consist of French voile and East German burnt-out lace (referred to as macrame). The petitioner contends the current tariff treatment by Customs of the curtains and valances as products of Holland, and the imposition of the Column 1, Tariff Schedules of the United States (TSUS; 19 U.S.C. 1202), rate of duty, is incorrect. Instead, the petitioner believes the curtains and valances should be treated as products of East Germany and assessed at the higher Column 2, TSUS, rate of duty. This document invites comments with regard to the correctness of the current classification.

DATE: Comments must be received on or before January 24, 1986.

ADDRESS: Comments (preferably in triplicate) may be submitted to and inspected at the Regulations Control Branch, Room 2426, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Phil Robins, Classification and Value Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-8181).

SUPPLEMENTARY INFORMATION:

Background

A petition has been filed under § 516, Tariff Act of 1930, as amended (19 U.S.C. 1516), on behalf of an American manufacturer of "burnt-out lace furnishings," that is, a producer of curtains, va-

lances and bedspreads made from imported voile and burnt-out lace, herein referred to as macrame. The petitioner contends that virtually identical curtains and valances are being imported into the U.S. from Holland, and that these articles consist of French voile and East German macrame. The petitioner further argues that it is a mere assembly operation that takes place in Holland and that Customs determination that these curtains and valances are products of Holland is incorrect. Instead, the petitioner believes Customs should regard the curtains and valances as products of East Germany since the principal value, processing and workmanship in the finished goods is imparted by virtue of the macrame.

The change in tariff treatment that would result from adopting the petitioner's position is quite substantial. The merchandise in question is classified under the provision for burnt-out lace furnishings, in item 365.68, Tariff Schedules of the United States (TSUS; 19 U.S.C. 1202). Products of Holland classified under item 365.68, TSUS, are dutiable at the Column 1, TSUS, rate of 16% ad valorem, while similar products of East German origin are assessed duty at the Column 2, TSUS, rate of 90% ad valorem.

Description of the Merchandise

The imported merchandise that is the subject of this petition is curtains and valances which consist of various combinations of voile fabrics produced in France and macrame sections produced in East Germany of either 100% polyester yarn or a blend of silk and polyester. This voile is made to specifications which, in the petitioner's opinion, make it suitable for use exclusively in the home furnishings industry.

The macrame sections which are attached to the voile are produced in what the petitioner characterizes as "an enormously complicated, labor-intensive operation," which involves embroidery, chemical treatment, baking, and finishing. According to the petitioner, this macrame is also dedicated to use specifically as home furnishings since its weight and design make it unsuitable for any other use.

The voile from France and macrame which has come from East Germany arrive in Holland in bolts. There, the voile is cut into desired patterns which are combined with the macrame sections to form the finished curtains and valances.

Issues Raised

The petitioner has proffered two basic arguments in support of his position that these imported curtains and valances should be treated as products of East Germary. First, it is argued that the recently revised country of origin rules for textile products, which were published as T.D. 85-38 in the Federal Register on March 5, 1985 (50 FR 8710), dictate such a finding. According to the petitioner:

"Pursuant to § 12.130(d)(1), Customs Regulations (19 CFR 12.130(d)(1)), a 'new and different article of commerce' does not result from the simple assembly operation performed in the Netherlands since there is no change in (i) commercial designation or identify, (ii) fundamental character or (iii) commercial use."

This is because the petitioner considers the attachment of the voile to the macrame in Holland as "irrelevant" to making the article a burnt-out lace furnishing. The petitioner states that the macrame bands alone are sometimes used as valances or curtains and do not lose their identity by having the voile attached to them.

The petitioner also believes the criteria of § 12.130(d)(2), Customs Regulations (19 CFR 12.130(d)(2)), establish East Germany as the country of origin of the curtains and valances since: (i) the physical change to the article as a result of the manufacturing process that takes place in East Germany is far greater than the change brought about by cutting and hemming in Holland, (ii) the time, complexity, and skill involved in the manufacture of macrame in East Germany are far greater than the time, complexity, and skill involved in the assembly operation in Holland, and (iii) the value of the macrame comprises from 33% to 76% of the value of the finished article.

The petitioner's second argument is that the application of relevant case law would result in a determination that East Germany is the country of origin of the curtains and valances. The reasoning advanced here, as it was stated in *Belcrest Linens* v. *United States*, 741 F.2d 1368, [6 ITRD 1049] (Fed Cir. 1984), is that an article is the growth, produce or manufacture of an intermediary country if as a result of processes performed in that country, a new article emerges with a new name, use or identify. In this instance however, the petitioner believes that the voile and macrame are dedicated to their end use as furnishings when they leave France and East Germany respectively, and that a substantial transformation does not take place in Holland where the fabrics are subjected to nothing more than a minor assembly operation.

COMMENTS

Pursuant to § 175.21(a), Customs Regulations (19 CFR 175.21(a)), before making a determination on the matter, Customs invites written comments on the petition from interested parties.

The domestic interested party petition, as well as all comments received in response to this notice will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), between the hours of 9:00 a.m to 4:30 p.m. on regular business days, at the Regulations Control Branch, Room 2426, Headquarters, U.S. Cus-

toms Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

AUTHORITY

This notice is published in accordance with § 175.212(a), Customs Regulations (19 CFR 175.21(a)).

DRAFTING INFORMATION

The principle author of this document was John E. Doyle, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices particpated in its development.

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: November 12, 1985.
DAVID D. GREEN,
Assistance Secretary of the Treasury

[Published in the Federal Register, November 25, 1985 (50 FR 48430)]

U.S. Court of Appeals for the Federal Circuit

(Appeal No. 84-1591)

FREEPORT MINERALS CO., (FREEPORT-MCMORAN, INC.), APPELLANT
v. UNITED STATES, APPELLEE

SHELL CANADA RESOURCES, LTD. AND CANADIAN SUPERIOR OIL, LTD., INTERVENORS

Harvey M. Appelbaum, Covington & Burling, of Washington, D.C., argued for appellant. With him on the brief was *David R. Grace*.

Albert F. Rothwell, Vice President, Freeport Minerals Company, of counsel.

Sheila N. Ziff, Commercial Litigation Branch, Department of Justice, of Washington, D.C., argued for appellee United States. With her on the brief were *Richard K. Willard*, Acting Assistant Attorney General, *David M. Cohen*, Director and *Velta A. Melnbrencis*, Assistant Director.

Patrick F. J. Macrory, Arnold & Porter, of Washington, D.C., argued for intervenor Shell Canada. With him on the brief was *Spencer S. Griffith*.

David J. Mark, Shearman & Sterling, of New York, New York, argued for intervenor Canadian Superior. With him on the brief was *Donald L. Cuneo*.

Appealed from: United States Court of International Trade.
Judge Maletz.

(Appeal No. 84-1591)

FREEPORT MINERALS CO., (FREEPORT-MCMORAN, INC.), APPELLANT
v. UNITED STATES, APPELLEE

SHELL CANADA RESOURCES, LTD. AND CANADIAN SUPERIOR OIL, LTD., INTERVENORS

(Decided November 7, 1985)

Before BENNETT, *Circuit Judge*, MILLER,* *Senior Circuit Judge*, and SMITH, *Circuit Judge*.

MILLER, *Senior Circuit Judge*.

This is an appeal by a domestic producer of elemental sulfur from the decision of the United States Court of International Trade granting the Government's motion for summary judgment and

* Judge Miller assumed senior status on June 6, 1985.

thereby affirming the International Trade Administration's final determination to revoke its antidumping finding regarding two Canadian producers. We reverse and remand for further proceedings.

BACKGROUND

The relevant facts of this case are described extensively in the published opinion of the Court of International Trade ("CIT"), 590 F. Supp. 1246 (1984), and familiarity therewith is presumed. Only the facts critical to the disposition of this case are repeated.

In 1973, the Treasury Department ("Treasury")[1] issued a finding of dumping against a number of Canadian manufacturers of elemental sulfur, including Shell Canada Resources Limited ("Shell") and Canadian Superior Oil Limited ("Superior"), intervenors in this appeal. 38 Fed. Reg. 34,655 (1973). In February of 1979, Treasury issued a tentative determination to modify or revoke the finding, having found an absence of sales at less than fair value ("LTFV") between January, 1975, and December, 1976. 44 Fed. Reg. 8,057 (1979). However, no final action was taken by Treasury.

In January, 1980, the Department of Commerce International Trade Administration ("ITA") assumed administrative responsibility for the provisions of the Trade Agreements Act ("TAA") and began an administrative review required under section 751(a) of the act, 19 U.S.C. § 1675(a). *Elemental Sulphur From Canada*, 46 Fed. Reg. 45,789 (1981). The ITA requested and received data for the years 1977 and 1978 from Shell and Superior, both of which also agreed in writing to an immediate suspension of liquidation and reinstatement of the dumping finding should the evidence later indicate that elemental sulfur produced by them was imported into the United States at LTFV. In April, 1981, the ITA issued a tentative determination to revoke the dumping finding against the foreign producers: Shell, on the basis of its finding that there were no sales at LTFV (with a negligible exception) between January 1, 1976, and February 8, 1979; and Superior, between July 1, 1976, and February 8, 1979. 46 Fed. Reg. 21,214 (1981). The ITA further found that there was no indication of sales at LTFV for either foreign producer since February 8, 1979. *Id.*

Following the tentative determination, Freeport Minerals Company ("Freeport"), a domestic producer of elemental sulfur, requested a full hearing under 19 U.S.C. § 1675(d), and this was conducted in October, 1981. At the hearing, Freeport submitted a Department of Commerce's preliminary review determination of September 15, 1981, which found that most Canadian sulfur producers were selling the commodity in the United States at LTFV during the period ending in November or December, 1980.[2] The ITA re-

[1] Predecessor administering authority for the federal antidumping statute, the Antidumping Act of 1921, as amended, 19 U.S.C. § 160 *et seq.* (1970). This statute was replaced by the Trade Agreements Act of 1979, 19 U.S.C. §§ 1671–1677g, when it became effective January 1, 1980.

[2] This review covered 47 of the 52 known Canadian producers of elemental sulfur, *Elemental Sulphur From Canada*, 46 Fed. Reg. 45,789 (1981). Notably absent from the report were findings on Shell and Superior.

fused to require Shell and Superior to submit information updated through the date of its tentative determination to revoke.

In December of 1981, the ITA made a final revocation determination (effective Jan. 27, 1982), from which Freeport sought review in the CIT. 47 Fed. Reg. 3,811 (1982).

OPINION

Freeport contends, *inter alia*, that the CIT's decision, upholding the ITA determination, was wrong because said determination was not supported by substantial evidence of record, was contrary to statute, and was an abuse of discretion. *Cf.* 19 U.S.C. § 1516a(b)(1) (1982); *Matsushita Electric Industrial Co.* v. *United States*, 750 F.2d 927, 932 (Fed. Cir. 1984) (standard of review). The Government, Shell, and Superior seek to justify the determination of the ITA and the decision of the CIT by urging that the ITA's determination was within its discretionary authority. Due to our holding that in this case the ITC abused its discretion, we need not address Freeport's other contentions challenging the ITA's interpretations of, and actions under, the applicable statutes and regulations.

The Government and intervenors argue that the statements in the regulations granting discretion to an administering authority are to be read broadly. Indeed, there is precedent for this, although such discretion is not "unbounded." *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 166–68 (1962); *Chevron Standard Ltd.* v. *United States*, 563 F. Supp. 1381, 1384 (Ct. Int'l Trade 1983). 19 U.S.C. § 1675(c), "Revocation of countervailing duty order or antidumping duty order," provides in pertinent part: "The administering authority may revoke, in whole or in part, a countervailing duty order or an antidumping duty order, or terminate a suspended investigation, after review under this section," and a related regulation, 19 CFR § 353.54, "Revocation of antidumping duty orders and termination of suspended investigations, (a) *In general*," similarly provides:

> [w]henever the Secretary determines that sales of merchandise subject to an Antidumping Finding or Order or a suspended investigation are no longer being made at less than fair value within the meaning of section 731 of the Act and is satisfied that there is no likelihood of resumption of sales at less than fair value, he may act to revoke or terminate, in whole or in part, such Order or Finding * * *. Ordinarily, consideration of such revocation or termination will be made only subsequent to a review as described in § 353.53 of this part.

However, the grant of discretionary authority to an agency implies that the exercise of discretion be predicated upon a judgment anchored in the language and spirit of the relevant statutes and regulations. Section 353.54, quoted above, must be read in conjunction with the provision to which it refers. The "review" referred to in 19 U.S.C. § 1675(c) and 19 CFR § 353.54 is mandated by 19 U.S.C.

§ 1675(a), "Periodic review of amount of duty." That review is required to be made at least once during each 12-month period after promulgation of an antidumping order to determine: The amount of net subsidy, the amount of any antidumping duty, and the current status of and compliance with any agreement with the administering authority. 19 U.S.C. § 1675(a)(2) further requires the ITA to determine both the foreign market value and United States price of each entry of merchandise subject to the antidumping duty order and the amount by which the foreign market value of each such entry exceeds the United States price of the entry.

As pointed out above, 19 CFR § 353.54(a) requires (1) that the Secretary determine that sales subject to an antidumping order are no longer being made at LTFV and (2) that the Secretary be satisfied that there is no likelihood of resumption of such sales. Thus, not only is a review required "during each 12-month period" under 19 U.S.C. § 1675(a),[3] but the responsibility for making the findings is upon the ITA, which must verify the information it receives under 19 U.S.C. § 1675(a) to support a revocation of an antidumping determination under 19 U.S.C. § 1675(c). S. Rep. No. 249, 96th Cong., 1st Sess. 98, *reprinted in* 1979 *U.S. Code Cong. & Ad. News* 381, 484; *Al Tech Specialty Steel Corp.* v. *United States*, 745 F.2d 632, 636 (Fed. Cir. 1984).

Moreover, another regulation (19 CFR § 153.44(d)) for the years involved emphasized the importance of current data by mandating that "the Secretary may determine a final modification or revocation is warranted *only if* such company also provides information showing no sales at less than fair value *up to the date of publication of the 'Notice of Tentative Determination to Modify or Revoke Dumping Finding.'*" (Emphasis supplied.) ITA's policy of making findings during the gap period between the last review and the date of the tentative revocation has been described in ITA releases (e.g., *Roller Chain, Other Than Bicycle, From Japan*, 48 Fed. Reg. 51,801, 51,805; *Steel Wire Strand for Prestressed Concrete From Japan*, 48 Fed. Reg. 45,586, 45,587-88 (1983)).

The House Report on the proposed Trade Agreements Act, like the Senate Report, emphasized the importance of using current information with respect to making determinations. "The Committee intends that the Authority and the ITC should *always* use the most up-to-date information available." *Al Tech Specialty Steel Corp.*, 745 F.2d at 640; H.R. Rep. No. 317, 96th Cong., 1st Sess. 77 (1979). The Government has not provided any reasonable basis for its construction of the statute and regulations to permit otherwise.

Congress intended "investigations being commenced unless the authority is convinced that the petition and supporting

[3] Congress described the purpose of section 1675: "*Reason for the provision.*—This provision expedites the administration of the assessment phase of antidumping and countervailing duty investigations. It provides a greater role for domestic interested parties and introduces more procedural safeguards." S. Rep. No. 249, 96th Cong., 1st Sess. 80-81, *reprinted in* 1979 *U.S. Code Cong. & Ad. News* 381, 466-67.

information * * * [do] not provide information supporting the allegations which is reasonably available to [the petitioner]." S. Rep. No. 249, 96th Cong., 1st Sess. 63, *reprinted in* 1979 *U.S. Code Cong. & Ad. News* 449.[4] Moreover, Congress "intend[ed] the determination as to the information 'reasonably available' to a petitioner to be made in light of the circumstances of each petitioner," because "[i]nformation may be reasonably available to one petitioner but not to another." *Id.* thus, the legislative history makes clear that, although certain evidence is required from the petitioner for the ITA to revoke an antidumping order, the administering authority must take into consideration the best information available to it, including that supplied by petitioner, and a petitioner's supporting material "reasonably available" to it. *Id.*

In support of the domestic petitioner, Congress intended that the ITA would provide "the maximum availability of information to interested parties" because access to information is imperative for the offensive assertion of its rights. *Id.* at 486. One of the reasons the TAA was promulgated was to remedy the situation recognized by the lawmakers that "[p]etitioners under the antidumping * * * laws have long contended that their ability to obtain relief has been impaired by its [sic] lack of access to the information presented by the exporters and foreign manufacturers." *Id.*

In this case, the ITA did not conduct a 19 U.S.C. § 1675(a) review within a year of its tentative revocation determination, and this precluded Freeport's access to current review findings; also, it refused to require Shell and Superior to answer questionnaires on foreign market value and United States pricing data more recently than two years (and for some information, longer) before the final antidumping duty order revocation. Absent access to current data, which were readily obtainable by the ITA,[5] Freeport had no means of acquiring more "substantial" evidence than it produced at the October 19, 1981, hearing.

Although this court has often deferred to decisions of the administering authority, presumed to be correct, we are persuaded that, in this case, the ITA's refusal to request domestic sales data from Shell and Superior placed upon Freeport an impermissible burden of proof contrary to the policies underlying the applicable statute and regulations.

The Government's arguments suggest that the requirement to make more current findings would impose an unmanageable review-function burden on the ITA. However, Congress clearly considered this point:

---

[4] Although the Government and intervenors attempt to distinguish between the requirements for the *initiation* of an investigation and those for the *perpetuation* of an order, they have offered no reasonable explanation why Congress would have thought the latter a less important or less critical determination warranting less current findings.

[5] The ITA could easily have sent questionnaires to Shell and Superior at the same time it sent them to the other 47 Canadian producers in 1980. There was no reasonable explanation of why even more current data could not have been requested by the ITA.

> The Committee feels very strongly that both the countervailing and antidumping duty laws have been inadequately enforced in the past, including the lack of resources devoted to this important area of law. The provisions of this bill are intended to remedy this situation * * *. It is the Committee's understanding that the Executive branch will request appropriations for the purpose of making substantial increases in personnel assigned to the administration of the antidumping and countervailing laws. The Committee cannot emphasize too strongly the need for adequate resources and its expectation that they will be provided.

Al Tech Specialty Steel Corp., 745 F.2d at 641; H.R. Rep. No. 317, 96th Cong., 1st Sess. 49 (1979).

We are not persuaded by the Government's argument that "transitional" cases, involving antidumping determinations that were not terminated by Treasury, are distinguishable from those originally administered by ITA and that the former should receive fewer reviews than the latter. Nor are we persuaded that Congress did not recognize, when it transferred administrative functions from Treasury to the ITA, that there would be a large backlog of reviews to be performed. If Congress had intended the ITA to short shrift the "transitional case" of domestic producers and manufacturers by allowing them fewer reviews, or reviews more remote than those for cases administered originally by the ITA, we believe it would have made explicit such a distinction.[6]

In view of the foregoing, we hold that the ITA's failure to obtain recent sales data requested by Freeport constituted an abuse of discretion.

Accordingly, the decision of the CIT is reversed and the case remanded for further proceedings consistent with this opinion.

REVERSED and REMANDED

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[6]The intervenors' argument in support of the ITA's failure to request additional data that "any additional delay would be inequitable and oppressive" to them is without merit. None of the purposes of the TAA was to prevent foreign producers and manufacturers from experiencing some administrative discomfort.

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

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Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

Clerk

Joseph E. Lombardi

ABSTRACTED PROTEST

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESS	
				Item No. and rate	It
P85/240	Rao, J. November 8, 1985	Erlanger, Blumgart & Co.	78–5–00927	Item 355.82 12.5¢ per lb. +15%	Ite
P85/241	Restani, J. November 13, 1985	Alfa-Laval Inc.	83–9–01283	Item 661.35 4.2%	Ite
P85/242	Restani, J. November 13, 1985	E. Gluck Corp.	84–1–00079, etc.	Item 715.05 (716.14/716.18) Various rates for modules Item 720.24 or 720.28 Various rates for cases Item 740.35 Various rates for bands Merchandise marked "A" and "B"	Ite 5.1 mo ma Ite ite
P85/243	Restani, J. November 13, 1985	Tomy Corp.	83–4–00615	Item 735.20 10%, 9% or 8.4% Item 737.95 14.9% 16.2% or 13.6%	Ite 4.9 Ite
P85/244	Restani, J. November 13, 1985	Tomy Corp.	83–9–01353	Item 737.95 13.6%	Ite

SSESSED		BASIS	PORT OF ENTRY AND MERCHANDISE
ate	Item No. and rate		
	Item 771.40 4%	U.S. v. Canadian Vinyl Industries, 64 CCPA 97, C.A.D. 1189 (1977)	New York Polyurethane leather
	Item 870.40 Free of duty	Agreed statement of facts	Buffalo Bulk milk coolers or farm tanks
	Item 688.36 5.5%, 5.3%, 5.1% or 4.9%, merchandise marked "A" Items 656.25, 657.25, or 657.35 Various rates, items marked "B"	Agreed statement of facts	New York Modules; modules and cases; or modules, cases, and bands; items marked "A"—an entirety Cases, items marked "B"
	Item 734.20 5.5%, 5.1% or 4.9%	Agreed statement of facts	Los Angeles Games
%	Item A734.20 Free of duty		
	Item 734.20 4.9% or 5.1%	Agreed statement of facts	Los Angeles Games

ABSTRACTED PROTEST D

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	AS
				Item No. and rat
P85/245	Restani, J. November 13, 1985	Tomy Corp.	83-11-01603	Item 735.20 8.4% or 9% Item 737.95 13.6%
P85/246	Restani, J. November 13, 1985	Tomy Corp.	84-1-00029	Item 735.20 6.32% or 8.4% or 9% Item 737.95 12.3%, 13.6% o 14.9%
P85/247	Restani, J. November 13, 1985	Tomy Corp.	84-4-00518	Item 737.95 12.3%
P85/248	Restani, J. November 13, 1985	Tomy Corp.	84-8-01216	Item 737.95 12.3%
P85/249	Restani, J. November 13, 1985	Tomy Corp.	85-2-00211	Item 737.95 12.3% or 10.9%
P85/250	Restani, J. November 13, 1985	Webster Watch Co.	84-10-01367	Item 682.95 6.9%

CST DECISIONS—Continued

ASSESSED		BASIS	PORT OF ENTRY AND MERCHANDISE
and rate	Item No. and rate		
0 9% 5	Item 734.20 4.9% or 5.1%	Agreed statement of facts	Los Angeles Games
0 r 8.4% 5 3.6% or	Item 734.20 4.7%, 4.9% or 5.1%	Agreed statement of facts	Los Angeles Games
5	Item 734.20 4.7%	Agreed statement of facts	Los Angeles Games
5	Item 734.20 4.7%	Agreed statement of facts	Los Angeles Games
5 r 10.9%	Item 734.20 4.7% or 4.5%	Agreed statement of facts	Los Angeles Games
5	Item 800.00 Free of duty	Agreed statement of facts	New York Primary batteries; American goods returned

ABSTRACTED REAPPRAISEM

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	
R85/480	Re, C.J. November 8, 1985	Adorence Co	76-5-01100, etc	Export value	Appr ent tio cu
R85/481	Re, C.J. November 8, 1985	C. Itoh & Co	73-11-03171, etc	Export value, items marked "A" and "C" United States value, items marked "D"	Appr ent tio cu ite Invoi les for su "C Land sta ge pr 11 fre du de in be va clu cy ma
R85/482	Watson, J. November 8, 1985	Arthur J. Fritz Co	R62/11845, etc	Export value	F.o.b. plu bet an
R85/483	Watson, J. November 8, 1985	Bunge Corp	290976A, etc	Export value	Appr the

	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports v. U.S., C.D. 4739	New York Not stated
	Appraised values shown on entry papers less additions included to reflect currency revaluation, items marked "A"	C.B.S. Imports v. U.S., C.D. 4739	New York Not stated
	Invoiced CIF or C&F price less statutory deductions for ocean freight and insurance, items marked "C"		
	Landed duty paid price less statutory deductions for general expenses and profit in an amount of 11.72% thereof less freight, insurance and duty, provided that said deductions do not result in an appraised value below the fob invoiced values, less additions included to reflect currency revaluation, items marked "D"		
	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	Portland, Or. Sewing machine heads
	Appraised values less 7.5% thereof	Agreed statement of facts	New York Wool hooked rugs

ABSTRACTED REAPPRAISEMEN

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	
R85/484	Watson, J. November 8, 1985	Mitsui & Co	R63/4365, etc	Export value	A
R85/485	Restani, J. November 8, 1985	De Laval Separator Co	81-1-00020	Export value	R

MENT DECISIONS—Continued

	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
	Appraised unit values less 7.5% thereof, net packed	Agreed statement of facts	Los Angeles Radios and parts; entirety
	Represented by invoice unit values, net packed, shown on commercial invoices with entery papers	Agreed statement of facts	Buffalo Not stated

Decision of United States Court of Appeals for the Federal Circuit

Freeport Minerals Co. *v.* United States, 7 CIT 352, Slip Op. 84–69, 590 F. Supp. 1246 (June 14, 1984), *rev'd and remanded*, — F.2d — (Fed. Cir. Nov. 7, 1985).

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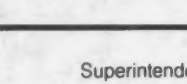

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